

(2019) 02 J&K CK 0022

In the Jammu And Kashmir High Court

Case No : Habeas Corpus Petition (HCP) No. 305 Of 2018

Umar Jan Dar

APPELLANT

Vs

State Of Jammu & Kashmir & Ors

RESPONDENT

Date of Decision : 06-02-2019

Acts Referred:

Jammu & Kashmir Public Safety Act, 1978 — Section 8
Constitution Of India, 1950 — Article 21, 22

Citation : (2019) 02 J&K CK 0022

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Aftab Ahmad, Mir Suhail

Final Decision : Allowed

Judgement

1. Pursuant to order bearing No.24/DMP/PSA/18 dated 04.09.2018, passed by respondent No.2-District Magistrate, Pulwama, in exercise of powers conferred in him under clause (a) of Section 8 of the J&K Public Safety Act, 1978, Shri Umar Jan Dar son of Ab. Aziz Dar resident of Tahab District Pulwama (hereinafter referred to as the detainee), has been taken into preventive custody. Validity of the said order is assailed through the medium of instant petition on the grounds enumerated therein.

2. The detention order has been challenged, mainly, on the ground that the detaining authority has failed to apply its mind to the fact whether the preventive detention of the detainee was imperative notwithstanding his custody in substantive offence. To this, it has been added that the respondent No.2 has passed the order of detention on the dictates of the sponsoring agency i.e. the officer who has prepared the police dossier and no attempt has been made by the respondent No.2 to scan and evaluate it before passing the order of detention.

3. Counter has been filed by the respondents wherein it is stated that the

grounds of detention have been furnished to the detainee. The detaining authority has complied with the requirements of Clause 5 of Article 22 read with Article 21 of the Constitution of India. The detainee has failed to avail the remedy prescribed under the act. He has not filed the representation against the order of detention. It has also been stated that the detainee is involved in case FIR No.425/2016 and FIR No.228/2018, registered in Police Station, Pulwama, In the end it has been urged that since the detention order has been passed on justifiable grounds, therefore, the instant petition may be dismissed.

4. Heard and considered

5. The main plank of argument of the learned counsel for the petitioner is that since the detainee was already in custody in the FIRs cited above that formed the baseline of the order of detention, therefore, detainee could not have been detained under the provisions of the Act of 1978. Testing the argument and the question on the touchstone of the law laid down by the Apex Court of the Country at paragraph 24 of the judgment in the case of "Sama Aruna v. State of Telangana & Anr" (AIR 2017 SC 2662), such a course could not have been adopted. Paragraph No.24 of the said judgment reads as under:

"24. There is another reason why the detention order is unjustified. It was passed when the accused was in jail in Crime No.221 of 2016. His custody in jail for the said offence was converted into custody under the impugned detention order. The incident involved in this offence is sometime in the year 2002-03. The detainee could not have been detained preventively by taking this stale incident into account, more so when he was in jail. In Ramesh Yadav v. District Magistrate, Etah and ors, this Court observed as follows:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detainee was released on bail he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed."

6. The same view has been reiterated by the Hon'ble Supreme Court in Paragraph No.13 of the judgment delivered in the case of "V. Shantha v. State of Telangana & Others" (AIR 2017 SC 2625). Para 13 of the said judgment is relevant to be quoted as under:

"13.The order of preventive detention passed against the detainee states that his illegal activities were causing danger to poor and small farmers and their safety and financial well-being. Recourse to normal legal procedure would be time consuming and would not be an effective deterrent to prevent the detainee from indulging in further prejudicial activities in the business of spurious seeds,

affecting maintenance of public order and that there was no other option except to invoke the provisions of the preventive detention Act as an extreme measure to insulate the society from his evil deeds. The rhetorical incantation of the words "goonda" or "prejudicial to maintenance of public order" cannot be sufficient justification to invoke the draconian powers of preventive detention. To classify the detainee as a "goonda" affecting public order because of inadequately yield from the chilli seed sold by him and prevent him from moving for bail even is a gross abuse of the statutory power of preventive detention. The grounds of detention are ex-facie extraneous to the Act."

7. Looking at the instant case on the parameters of the law laid down above, the detainee could not have been detained after taking recourse to the provisions of the Act of 1978, when he was already in custody in the cases, details of which have been given hereinbefore. This single infraction knocks out the bottom of the contention raised by the State that the detainee can be detained in preventive custody when he was already in custody. It cuts the very root of the state action. The State ought to have taken recourse to the ordinary law of the land.

8. For the stated reasons and the law laid down by the Hon'ble Apex Court, petition is allowed and impugned detention is quashed. Further custody of the detainee shall be governed in accordance with the orders as shall be passed by the court of competent jurisdiction in the criminal case registered against him.

9. Detention records as produced are returned to the learned counsel for the respondents.